

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID PEÑA REYES,

Defendant and Appellant.

F057952

(Super. Ct. No. BF125217A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Mark J. Shusted, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Supervising Louis M. Vasquez, and Lloyd G. Carter Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Before Wiseman, A.P.J., Cornell, J., and Gomes, J.

Appellant, David Peña Reyes, pled no contest to possession for sale of heroin (Health & Saf. Code, § 11351) and possession of heroin (Health & Saf. Code, § 11350) and admitted a prior conviction enhancement (Health & Saf. Code, § 11370.2, subd. (a)) and a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)).¹ On appeal, Reyes contends the court erred by its failure to dismiss count 2. Additionally, pursuant to this court's "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010 (Supplemental Briefing Order)--discussed in greater detail below--we deem Reyes to have raised the contention that he is entitled to additional conduct credit under a recent amendment to section 4019. We will find merit to Reyes claim that the court should have dismissed count 2 and reverse his conviction on that count. In all other respects, we will affirm.

FACTS

On October 9, 2008, police officers went to a residence to conduct a parole search and arrested Reyes after finding that he had an active parole warrant. During a search of Reyes an officer found \$431 and a plastic baggie containing 5.69 grams of heroin.

On February 4, 2009, the district attorney filed an information charging Reyes with the counts and enhancements noted above.

On April 3, 2009, Reyes entered his plea in this matter in exchange for an indicated term of five years. Although defense counsel advised the court that Reyes could not be convicted on count 2 because it was a lesser included offense of the offense charged in count 1, the court did not rule on the matter.

On May 1, 2009, the court struck the prior prison term enhancement and sentenced Reyes to an aggregate 5 year term, the middle term of 2 years on the possession for sale

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

of heroin conviction, and a three-year prior conviction enhancement. The court stayed a term of 16 months on count 2.

DISCUSSION

The Possession of Heroin Conviction

Reyes contends the court should have granted his motion to dismiss count 2 because possession of heroin is a lesser included offense of possession for sale of heroin. Respondent concedes and we agree.

“[M]ultiple convictions may *not* be based on necessarily included offenses. [Citations.] ... [¶] ... ‘[W]here an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.’” (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Possession of heroin is a necessarily included offense of possession for sale of heroin when both offenses are based on the possession of the same contraband as occurred here. (*People v. Magana* (1990) 218 Cal.App.3d 951, 954.) Both of Reyes’s convictions were based on Reye’s possession of 5.69 grams of heroin. Accordingly, we will reverse Reyes conviction in count 2 for simple possession.

The Credit Issue

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a)). In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 734, 939, fn. 3.)

The court sentenced on May 1, 2009, and calculated his conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could

be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its Supplemental Briefing Order, ordered that in pending appeals in which the appellant is arguably entitled to the benefit of the more generous conduct credit accrual provisions of the 2010 amendment to section 4019, we would deem raised, without additional briefing, the contentions that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.

As this court explained in the recent case of *People v. Rodriguez* (2010) 183 Cal.App.4th 1, the 2010 amendment does not operate retroactively and does not violate the constitutional guarantee of equal protection of the laws. Reyes is, therefore, not entitled to additional conduct credit under that amendment.

DISPOSITION

The conviction in count 2 for possession of heroin is reversed. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Director of Corrections and Rehabilitation. As modified, the judgment is affirmed.